APPENDIX C – 1

MEMORANDUM

TO: JURY INSTRUCTION COMMITTEE

CC: CYNTHIA N. SASS, ESQUIRE

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SUBJECT: FCRA JURY INSTRUCTIONS

DATE: 9/2/2011

The purpose of this memorandum is to provide a brief overview of the Florida Civil Rights Act of 1992 ("FCRA" or the "Act") in support of the draft model jury instructions proposed for employment claims brought pursuant to the FCRA.

Section 760.10 contains the prohibitions applicable to employment law claims. §760.10, Fla. Stat. (2011). The most often invoked provisions of the statute provide:

> **(1) It is an unlawful employment practice for an employer:**
>
> **(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.**
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> ...
>
> **(7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.**

§760.10(1)(a) & (7), Fla. Stat. (2011).[i]

As many courts have noted, the FCRA is modeled after Title VII of the Civil Rights Act of 1964. 42 U.S.C. §2000e, *et seq.* ("Title VII"). E.g., Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000) ("The statute's stated purpose and statutory

construction directive are modeled after Title VII of the Civil Rights Act of 1964.") (citing Florida State Univ. v. Sondel, 685 So.2d 923, 925 n. 1 (Fla. 1st DCA 1996) ("The Florida Civil Rights Act of 1992 was patterned after Title VII of the Civil Rights Act of 1964"); Green v. Burger King Corp., 728 So.2d 369, 371 (Fla. 3d DCA 1999) ("In addition to tracking much of the language of Title VII, the stated purpose is also in line with its federal counterpart."). Thus, both federal and state courts have interpreted the FCRA like Title VII. Id.

For the most part, the courts have treated the statutes as though they are one and the same.[1] Nonetheless, there are some notable differences between the state and federal statutes. One obvious example of the difference is that the FCRA includes age,[2] handicap,[3] and marital status as protected categories, whereas Title VII does not. Given the FCRA's explicit statement in only one provision of the Act (the attorneys' fee provision) that it should be interpreted in accord with federal law, it would seem apparent that the Florida legislature did not intend the rest of the FCRA to be interpreted just like federal law. §760.11, Fla. Stat. (2011). More likely, it intended the FCRA to be interpreted more broadly than Title VII to effectuate its intended purpose of furthering the civil rights of Floridians.

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[1] Accordingly, this is the reason we used the eleventh circuit's jury instructions as a starting point.

[2] Under federal law, age is a protected category under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.* ("ADEA"). The ADEA, however, is patterned after the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §201, *et seq.*, which is a different statutory scheme from that of Title VII.

[3] Disability discrimination is covered by the Rehabilitation Act of 1973, 29 U.S.C. §§791 & 794 ("Rehab Act"), which was the original federal statute prohibiting disability discrimination and generally applies to federal employers. The Americans with Disabilities Act of 1990, 42 U.S.C. §12101 *et seq.* ("ADA") is the federal, private sector counterpart to the Rehab Act, but there are notable differences between the two. For example, the Rehab Act requires proof that disability was the sole reason for the discriminatory action at issue, whereas the ADA requires only a showing that disability was a reason for the discriminatory action. Notably, both federal statutes were amended by the ADA Amendments Act of 2008 ("ADAAA") to broaden their coverage. 122 Stat. 3553; 42 U.S.C. §12101 *et seq.* There is no case law addressing whether those amendments will apply to disability claims brought under the FCRA, although it appears likely if the case law continues along the same path of interpreting the state statute like the federal statutes.

Whether or not Florida courts will continue to interpret the FCRA as though it simply mirrors Title VII in the future is questionable, particularly given the Supreme Court's decision in Gross v. FBL Fin. Servs., Inc., --- U.S. ----, 129 S. Ct. 2343, 174 L.Ed.2d 119 (2009). Gross will be discussed in more detail below, but it is significant because the Supreme Court ruled, contrary to long-standing precedent, that the intent requirement of the ADEA should not be interpreted like that of Title VII because the statutory language of the ADEA was never amended when Title VII was amended to incorporate the "same decision" defense.[4] Thus, the Court held the same decision defense does not apply to age discrimination cases under the ADEA as it does in Title VII cases. Gross, 129 S. Ct. 2343 (holding that the Price Waterhouse burden-shifting analysis does not apply to ADEA claims and no same decision defense is available). The Gross decision is likely to bring the statutory differences between the FCRA and its federal counterparts into focus in the coming years.

Nonetheless, the jury instructions are drafted upon the current state of the law, which interprets the FCRA like Title VII. As such, the following is a brief overview of the law that has developed under the FCRA, mostly through federal cases interpreting it the same as Title VII. Given the rapidly evolving law in employment discrimination cases, though, these instructions should be reviewed and revised regularly.

I. DIFFERENT THEORIES FOR DISCRIMINATION CLAIMS.

In drafting jury instructions for discrimination cases, it is necessary to identify the plaintiff's theory of liability to properly instruct on the proof required. The Eleventh Circuit

[4] As discussed in detail below, the "same decision" defense requires the employer to show that it would have taken the same action even if it had not considered the plaintiff's sex. Price Waterhouse, 490 U.S. at 252 (plurality opinion) ("proving that the same decision would have been justified ... is not the same as proving that the same decision would have been made"); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (same decision defense is a limited affirmative defense which, if proven, only restricts the remedies available to declaratory relief, injunctive relief, attorneys' fees and costs).

Court of Appeal explained the three theories generally available in discrimination cases in EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263 (11th Cir. 2000): disparate treatment, pattern and practice, and disparate impact. "Both pattern and practice and disparate treatment claims require proof of discriminatory intent; [footnote omitted] disparate impact claims do not." Joe's Stone Crab, 220 F.3d at 1273-74 (citing In Re Employment Litig. Against the State of Ala., 198 F.3d 1305, 1310 n. 8 (11th Cir.1999)).

The vast majority of employment discrimination claims are brought pursuant to the disparate treatment theory. Pattern or practice claims are rare, as they cannot be brought by private litigants. Under federal law, pattern or practice claims may only be brought by the United States Equal Employment Opportunity Commission ("EEOC"). The FCRA authorizes the Attorney General to bring pattern or practice claims of discrimination, §760.021, Fla. Stat. (2011), but there is no reported decision in which the Attorney General has ever done so. Although there is no decision on point, presumably private plaintiffs cannot bring such claims under state law because the statutory language, like that of Title VII, authorizes only the government to do so. E.g., NAACP v. Florida DOC, 2002 WL 34420335 (M.D. Fla. 2002) (explaining pattern and practice claims may only be brought by the EEOC, although pattern and practice evidence is admissible in an individual disparate treatment case). Disparate impact claims are also rare. Although private plaintiffs can bring these claims, they are rare by their nature and they are expensive to prosecute because of the need for expert statistical analysis, among other things.

Thus, the model jury instructions are drafted for disparate treatment claims. However, to provide context for the committee, a brief discussion of pattern and practice claims as well as disparate impact claims is provided to demonstrate the differences in proof required for the different theories.

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A. DISPARATE TREATMENT CLAIMS.

Disparate treatment claims are the most common type of discrimination claims. Simply put, these are claims in which the plaintiff alleges the employer treated him or her differently because of race, color, religion, sex, national origin, age, handicap or marital status. For brevity, the following will discuss the law in the context of sex discrimination, but the law applies the same to other protected categories.

"[I]n a disparate treatment case, the plaintiff bears the ultimate burden of proving that the employment action at issue was taken because of the plaintiff's sex." Joe's Stone Crab, 220 F.3d at 1273-74 (citing Holifield v. Reno, 115 F.3d 1555, 1564-65 (11th Cir.1997)). "In order to show discriminatory intent, a plaintiff must demonstrate "'that the decisionmaker ... selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects on an identifiable group.'"" Joe's Stone Crab, 220 F.3d at 1273-74 (citations omitted). A finding of disparate treatment requires no more than a finding that women were intentionally treated differently because of or on account of their gender. Joe's Stone Crab, 220 F.3d at 1283-84. "[A] plaintiff need not prove that a defendant harbored some special "animus" or "malice" towards the protected group to which she belongs. Id. ("In the race discrimination context, we recently have explained that 'ill will, enmity, or hostility are not prerequisites of intentional discrimination.'") (quoting Ferrill v. Parker Group, Inc., 168 F.3d 468, 473 n. 7 (11th Cir.1999)).

Nor is it necessary to show that the plaintiff's sex was the **sole reason** for the action taken against her. §760.10(1)(a), Fla. Stat. (2011) (making it unlawful for an employer to discriminate against any individual "***because of*** such individual's race, color, religion, sex, national origin, age, handicap, or marital status") (emphasis added); E.g., City of Hollywood v. Hogan, 986 So. 2d 634, 642 (Fla. 4th DCA 2008) (explaining that, to

prove intentional discrimination, "the plaintiff's age must have 'actually played a role in [the employer's decisionmaking] process and had a *determinative* influence on the outcome.'") (quoting Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141 (2000) (emphasis supplied) (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)); Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1334 (11th Cir. 1999) (explaining that ADA's "because of" causation language "merely imposes a '*but for*' liability standard" which requires showing only that disability was "a determinative, rather than the sole, decision making factor"); McNely v. Ocala Star-Banner Corp., 99 F.3d 1068 (11th Cir. 1996) (stating that in Price Waterhouse "all of the justices agreed that 'because of,' as used in Title VII, does *not* mean 'solely because of'"); Nix v. WLCY Radio, 738 F.2d 1181, 1294 (11th Cir. 1884) ("Illegal discrimination means that the adverse employment action of which the plaintiff complains was based (at least in part) on an impermissible criterion..."); see generally Price Waterhouse v. Hopkins, 490 U.S. 228, 245-46 (1989) ("once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role"); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (discussing mixed motive cases and approving jury instruction on mixed motive).[5] The

[5] The Rehab Act requires sole causation, for example, but the ADA does not. Cf. 29 U.S.C. §794(a) ("No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, ***solely by reason of*** her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.") (emphasis added) with 42 U.S.C. §12112(b)(1) (defining the term "discriminate against a qualified individual on the basis of disability" to include "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee ***because of*** *the disability* of such applicant or employee") (emphasis added). See, e.g., Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1334 (11th Cir. 1999) (explaining that ADA's "because of" language "merely imposes a '*but for*' liability standard" which requires showing only that disability was "a determinative, rather than the sole, decision making factor"); Ellis v. England, 432 F.3d 1321

"because of" causation standard utilized by both the FCRA and Title VII is a "but-for" causation which is defined as "a factor that *made a difference in the outcome.*" Farley, 197 F.3d at 1334 (citing McNely, 99 F.3d at 1077); Lane v. Broward County, Case No. 08-61554-CIV, 2008 WL 4926975 (S.D. Fla. Nov. 17, 2008) ("'[S]ubstantial motivating cause' means that race or sex was a factor, rather than the exclusive factor, in Defendant's decision. In contrast, the phrase 'solely because of' means that race or sex is the exclusive and only factor motivating Defendant's decision.") (quoting Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1334 (11th Cir.1999)).

Similarly, in order to establish that the plaintiff was discriminated against because of her gender, it is not necessary to show that only women were treated poorly. It is sufficient to show that she was treated worse than men. E.g., Kopp v. Samaritan Health System, Inc., 13 F.3d 264 (8th Cir. 1993) (despite bad treatment of both genders, finder of fact could reasonably determine that women were treated worse than men); Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 79 (1998) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.") (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring))).

B. PATTERN OR PRACTICE CLAIMS.

A brief explanation of the different burdens of proof for pattern and practice claims will demonstrate the stark contrast from the proof required in disparate treatment claims. In order to succeed on a pattern or practice claim of gender discrimination, for example, "the plaintiffs must establish 'that [sex] discrimination was the company's standard operating procedure.'" Joe's Stone Crab, 220 F.3d at 1286-87 (quoting Cox v.

(11th Cir. 2005) (Rehab Act requires proof that the plaintiff suffered adverse action "solely be reason of" his handicap) (citing 29 U.S.C. §794(a)).

American Cast Iron Pipe Co., 784 F.2d 1546, 1559 (11th Cir. 1986) (quoting Teamsters v. United States, 431 U.S. 324, 336 (1972) (citing Franks v. Bowman Transportation Co., 424 U.S. 747, 772 (1976))). "To meet this burden of proof, a plaintiff must 'prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts. It has to establish by a preponderance of the evidence that ... discrimination [is] the company's standard operating procedure--the regular rather than unusual practice.'" Joe's Stone Crab, 220 F.3d at 1286-87 (quoting Teamsters, 431 U.S. at 336 (footnote and internal quotation marks omitted)).

To establish liability, the plaintiff need not prove that any particular employee was a victim of the pattern or practice; it need only establish a prima facie case that such a policy existed. Joe's Stone Crab, 220 F.3d at 1286-87. "A plaintiff may establish a pattern or practice claim 'through a combination of strong statistical evidence of disparate impact coupled with anecdotal evidence of the employer's intent to treat the protected class unequally.'"[6] Joe's Stone Crab, 220 F.3d at 1286-87 (quoting Mozee v. American Commercial Marine Service Co., 940 F.2d 1036, 1051 (7th Cir.1991)).

"'[O]nce a pattern and practice of discrimination is established, a rebuttable presumption that [the] plaintiff was discriminated against because of her sex and is entitled to recovery obtains. The employer may overcome this presumption only with clear and convincing evidence that job decisions made when the discriminatory policy was in force were not made in pursuit of that policy.'" Joe's Stone Crab, 220 F.3d at 1287 n. 22 (quoting Cox, 784 F.2d at 1559) (citing Teamsters, 431 U.S. at 362). As the Supreme Court explained in Teamsters, rather than focusing on individual decisions, in the liability phase the employer's defense must be designed to meet and rebut the prima

[6] Statistical evidence is often used to establish the existence of a pattern or practice. Joe's Stone Crab, 220 F.3d at 1286-87 (quoting Lujan v. Franklin County Bd. of Educ., 766 F.2d 917, 929 (6th Cir.1985) (quoting Teamsters, 431 U.S. at 335 n. 15).

facie showing of a pattern and practice of discrimination by proving a "nondiscriminatory explanation" for the apparently discriminatory result. Teamsters, 431 U.S. at 360 n.46. To do so, the defendant had the burden of demonstrating that the class-wide statistical evidence was either "inaccurate or insignificant." Teamsters, 431 U.S. at 360; Joe's Stone Crab, 220 F.3d at 1287 n.22 ("[T]he burden of proof then shifts to the employer" to demonstrate that the showing of a pattern or practice of discrimination is either "inaccurate or insignificant."). If a pattern and practice is found, then all the employees subject to that unlawful practice are entitled to relief unless the employer can prove that a particular individual was not, in fact, discriminated against. Teamsters, 431 U.S. at 361-62; Joe's Stone Crab, 220 F.3d at 1287 n.22; Cox, 784 F.2d at 1559; Holmes, 706 F.2d at 1158.

C. DISPARATE IMPACT CLAIMS.

Disparate impact claims are entirely different. The disparate impact theory requires a showing of discriminatory impact on a protected group due to an otherwise neutral policy rather than a showing of any discriminatory intent. Joe's Stone Crab, 220 F.3d at 1273-74 (reversing finding of disparate impact discrimination and remanding for finding as to whether plaintiff demonstrated disparate treatment discrimination instead, stating district court failed to recognize that hiring only wait staff who fit the "old world" image was not based upon a facially neutral policy); see also Florida State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996) (explaining disparate impact theory and proof required). As the eleventh circuit explained:

> Simply put, disparate impact theory is available for the challenge of *facially-neutral* employment practices. *See, e.g., Lanning v. Southeastern Pennsylvania Transp. Auth., 181 F.3d 478, 485 (3rd Cir.1999)* (finding that "plaintiffs establish a prima facie case of disparate impact by demonstrating that application of a *facially neutral standard* has resulted in a significantly discriminatory hiring pattern") (emphasis added). Indeed, the district court properly recognized that "sex discrimination under the

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> theory of disparate impact occurs when a facially neutral rule or practice of the employer has a disproportionate impact on one sex... **To establish a prima facie case of disparate impact sex discrimination, the plaintiff must show that a *facially neutral* practice of the employer has a disproportionate impact on one sex.**" *Joe's, 969 F. Supp. at 735* (emphasis added).

Joe's Stone Crab, 220 F.3d at 1278; see generally Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (interpreting Title VII's provision making it unlawful "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of" to "proscrib[e] not only overt discrimination but also practices that are fair in form, but discriminatory in operation."); Pub.L. 102-166, § 105, 105 Stat. 1074, 42 U.S.C. §2000e-2(k) (codifying Griggs, stating "An unlawful employment practice based on disparate impact is established under this subchapter only if - a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity ... ."); accord Lewis v. City of Chicago, ___ U.S. ___, 130 S. Ct. 2191 176 L. Ed. 2d 967 (2010).

2. THE LAW APPLICABLE TO DISPARATE TREATMENT CLAIMS.

The following is a discussion of the law supporting the disparate treatment jury instructions. First, juries should *not* be instructed on the burden-shifting analysis, which is applied to discrimination cases to determine whether there is sufficient evidence to present to a jury, because doing so is too confusing. E.g., Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1333 (11th Cir. 1999) (As we have observed, "although statements [like 'prima facie case' and 'burden of production'] faithfully endeavor[] to tract the three-

step formulation of the *McDonnell Douglas Corp. v. Green* ..., the create[] a distinct risk of confusing the jury.") (citing, among other cases, Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999)).[7] Once the case reaches the jury, the burden-shifting analysis "simply drops out of the picture" and the only question for the jury to answer is the ultimate question of whether the employer took the adverse action for a discriminatory reason. Id. (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)).

A. DIFFERENT FORMS OF ACTIONABLE DISCRIMINATION.

It is helpful in preparing jury instructions to keep in mind that there are different forms of actionable discrimination. There are the obvious adverse actions such as failure to hire or firing, but there are also the more insidious forms of discrimination which are actionable under different doctrines. Those doctrines include, for example, hostile work environment and constructive discharge claims.

1. ADVERSE ACTIONS.

A plaintiff may establish a claim of sex discrimination by showing he or she was treated differently from men with regard to adverse actions such as hiring, promotion, discharge, transfers, compensation, training, and other terms, conditions and privileges

[7] The McDonnell Douglas framework is a "method of analysis for organizing a discrimination case in its initial stages to determine if a case has enough evidence to reach a jury in the first place" when the case is based upon circumstantial evidence, as most are. E.g., Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1333 (11th Cir. 1999). For example:

> Absent direct evidence, a plaintiff may prove intentional discrimination through the familiar *McDonnell Douglas* paradigm for circumstantial evidence claims. To establish a prima facie case of disparate treatment under this rubric, a plaintiff "must show: (1) she is a member of a protected class; (2) she was subjected to adverse employment action; (3) her employer treated similarly situated male employees more favorably; and (4) she was qualified to do the job." *Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999).* Once these elements are established, a defendant has the burden of producing "legitimate, non-discriminatory reasons for its employment action." *Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir.1997)* (citing *Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)).* If such a reason is produced, a plaintiff then has the ultimate burden of proving the reason to be a pretext for unlawful discrimination. *See Holifield, 115 F.3d at 1565.* [footnote omitted]

Joe's Stone Crab, 220 F.3d at 1285-86 (emphasis added).

of employment. Doe v. Dekalb Co. Sch. Dist., 145 F.3d 1441, 1448-49 (11th Cir. 1998). The eleventh circuit applies an objective standard for determining whether an employment action is sufficiently adverse to be actionable. This requires the claimant to show that a reasonable person would have found the action to be adverse under all the facts and circumstances. Doe, 145 F.3d at 1448-49.

2. HOSTILE ENVIRONMENT.

Even where certain actions are not sufficient to be considered "adverse actions" in and of themselves, the cumulative effect of those actions may amount to an actionable hostile environment. This is what is often referred to as a hostile or abusive working environment claims. Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); accord Blizzard v. Appliance Direct, Inc., 16 So. 3d 922 (Fla. 5th DCA 2009); Speedway SuperAmerica, LLC v. DuPont, 933 So.2d 75 (Fla. 5th DCA 2006) (following federal courts hostile environment case law), review dismissed 955 So. 2d 533 (Fla. 2007). In creating the doctrine of a "hostile environment," the courts recognized that the phrase "'terms, conditions, or privileges of employment" is an expansive concept which sweeps within its protective ambit the practice of creating a working environment. Henson, 682 F.2d at 901. In other words, the courts rejected the notion that the only type of conduct actionable as discrimination is ultimate employment actions, or employment actions that represent a "tangible loss" or have an "economic character". Harris, 510 U.S. at 22; Meritor, 477 U.S. at 64; Henson, 682 F.2d at 901. As the United States Supreme Court said in Faragher:

> We have repeatedly made clear that although the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition "'is not limited to "economic" or "tangible"

> discrimination,'" *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson, supra,* at 64, 106 S.Ct., at 2404), and that it covers more than " 'terms' and 'conditions' in the narrow contractual sense." *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 78, 118 S.Ct. 998, 1001, 140 L.Ed.2d 201 (1998). Thus, in *Meritor* we held that sexual harassment so "severe or pervasive" as to "'alter the conditions of [the victim's] employment and create an abusive working environment'" violates Title VII. 477 U.S., at 67, 106 S.Ct., at 2405-2406 (quoting *Henson v. Dundee,* 682 F.2d 897, 904 (C.A.11 1982)).

Faragher, 524 U.S. at 786.

Although much of the case law involving hostile environment claims has been decided in the context of sexual harassment claims, the doctrine applies equally to establish discrimination based upon other protected categories as well as to show gender discrimination of a non-sexual nature. E.g., Harris, 510 U.S. at 22; Henson, 682 F.2d at 901; Kopp v. Samaritan Health System, Inc., 13 F.3d 264 (8th Cir. 1993). Regardless of the context, harassment is actionable if a reasonable person would have found the environment hostile or abusive, and if the plaintiff subjectively found it so. Faragher, 524 U.S. at 786; Oncale, 523 U.S. 75; Harris, 510 U.S. 17; Meritor, 477 U.S. at 64; Henson, 682 F.2d 897.

In analyzing the objective component, the work environment must be looked at as a whole, not divided into a series of discrete incidents that are separately weighed and measured. The *totality of the circumstances* must be considered in determining whether the environment was objectively offensive:

> This is not, and by its nature cannot be, a mathematically precise test. ...Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance...no single factor is required.

Harris, 510 U.S. at 21-23; accord Faragher, 524 U.S. at 787-88; Meritor, 477 U.S. 57; Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1276 (11th Cir. 2002); Johnson v.

Booker T. Washington Broad. Serv., Inc., 234 F.3d 501, 509 (11th Cir. 2000); Mendoza v. Borden, Inc., 195 F.3d 1238, 1245-46 (11th Cir. 1999); Allen v. Tyson Foods, 121 F.3d 642, 647 (11th Cir. 1997); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510-11 (11th Cir.), overruled on other grounds Patterson v. McLean Cr. Un., 491 U.S. 164 (1989); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1523-24 (M.D. Fla. 1991). As the United States Supreme Court put it "[w]e have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a *reasonable person in the plaintiff's position, considering 'all the circumstances.'*" Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998) (emphasis supplied).

The totality of the circumstances includes evidence of harassment other females are subjected – not just harassment that the individual plaintiff suffered. Robinson, 760 F. Supp. at 1499; Tyson Foods, 121 F.3d at 647; EEOC v. Beverage Canners, 897 F.2d 1067, 1070 (11th Cir. 1990); Walker v. Ford Motor Co., 684 F.2d at 1355, 1359 n.2; (11th Cir. 1982); see also Busby v. City of Orlando, 931 F.2d 764, 785 (11th Cir. 1991); Phillips v. Smalley Maint. Servs., Inc., 711 F.2d 1524 (11th Cir. 1983).[8] For instance, sexually harassing comments or conduct can form a part of the hostile working environment, and support a particular plaintiff's claim, even though it was not directed at that particular plaintiff nor spoken in her presence. Id.; accord Blizzard v. Appliance Direct, Inc., 16 So. 3d 922 (Fla. 5th DCA 2009) (citing Jennings v. Univ. of North Carolina, 482 F.3d 686, 695 (4th Cir.), cert. denied, 552 U.S. 887 (2007)). As the United States District Court for the Middle District of Florida explained over a decade ago:

[8] Accord Spriggs v. Diamond Auto Glass, 242 F.3d 179, 184 (4th Cir. 2001); Conner v. Shrader-Bridgeport Int'l, 227 F.3d 179, 200 (4th Cir. 2000); Schwapp v. Town of Avon, 118 F.3d 106, 111 (2d Cir. 1997); Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987); Shrout v. Black Clawson Co., 689 F. Supp. 776 (W.D. Oh. 1998); Pease v. Alford Photo Indus, 667 F. Supp. 1188 (W.D. Tenn. 1987); Delgado v. Lehman, 665 F. Supp. 460 (E.D. Va. 1987).

> First, as with the incidents outside the time frame of a Title VII complaint involving Robinson, incidents involving other female employees place the conduct at issue in context. The pervasiveness of conduct constituting sexual harassment outside Robinson's presence works to rebut the assertion that the conduct of which Robinson complains is isolated or rare. Second, the issue in this case is the nature of the work environment. This environment is shaped by more than the face-to-face encounters between Robinson and male coworkers and supervisors. The perception that the work environment is hostile can be influenced by the treatment of other persons of a plaintiff's protected class, even if that treatment is learned second-hand. Last, other incidents of sexual harassment are directly relevant to an employer's liability for the acts of employees and to the issue of an appropriate remedy for the sexual harassment perpetrated against Robinson.

Robinson, 760 F. Supp. at 1499. "Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive." Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir.) (ruling district court erred by denying plaintiff the opportunity to demonstrate that the sexual harasser had directed his advances toward other women also), affirmed in part and reversed in part Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

The proof required to hold the employer liable for a hostile work environment depends upon whether the harasser is a supervisor or co-worker, and whether any tangible employment action is taken. If a plaintiff establishes that a supervisor subjected him/her to a hostile environment because of his/her gender, the employer is liable without any need to show that the employer was negligent or otherwise at fault for the supervisor's actions. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) ("A employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."); Faragher v. City of Boca Raton, 524 U.S. 775 (1998). If no tangible employment action is taken against the employee, though, the employer may assert an affirmative defense to liability for a supervisor's harassment. As the United

States Supreme Court explained:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Ellerth, 524 U.S. at 765; accord Faragher, 524 U.S. at 803-07.

Where the harasser is a co-employee (not a supervisor), the employer will be held directly liable if it knew or should have known of the harassing conduct but failed to take prompt remedial action. See Breda v. Wolf Camera & Video, 222 F.3d 886, 889 (11th Cir. 2000). "Thus, a victim of coworker harassment must show either actual knowledge on the part of the employer or conduct sufficiently severe and pervasive as to constitute constructive knowledge to the employer." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1278 (11th Cir. 2002).

3. CONSTRUCTIVE DISCHARGE AND FORCED RESIGNATION.

Another type of actionable conduct is that where the employer does not take the step of officially firing an employee, but instead constructively discharges the employee. See generally Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) (discussing

history of constructive discharge claims and recognizing that constructive discharge resulting from a hostile environment is but one subset of constructive discharge claims) (citing, among other authorities, *Comment, That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 Berkeley J. Emp. & Lab. L. 401, 410 (2002)).

The most common type of constructive discharge claim is where an employee quits to avoid intolerable working conditions. E.g., Suders, 542 U.S. 129; Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) ("when 'an employee involuntarily resigns in order to escape intolerable and illegal employment requirements' ... the employer has committed a constructive discharge") (citing Young v. Southwestern Savings & Loan Assoc., 509 F.2d 140, 144 (5th Cir. 1975)). In this type of constructive discharge claim, the plaintiff must demonstrate that her working conditions were so intolerable that a reasonable person in her position would have felt compelled to resign. Akins v. Fulton Co., Ga., 2005 U.S. App. LEXIS 17328, Case No. 04-11888 (11th Cir. Aug. 17, 2005) (evidence that plaintiffs' work duties were removed, they were excluded from meetings and isolated from co-workers, and accused of illegal behavior sufficient to support claims of constructive discharge); Poole v. Country Club of Columbus, Inc., 129 F.3d 551 (11th Cir. 1997) (issue of fact existed on constructive discharge claim where the plaintiff was stripped of all responsibility, given only a chair and no desk, and was isolated from conversations with other workers); see also Cortes v. Maxus Exploration Co., 977 F.2d 195 (5th Cir. 1992) (transferring plaintiff after complaint sufficient to constitute constructive discharge where plaintiff was given choice of either quitting or returning to be supervised by harasser).

Another type of actionable action is the situation in which an employee is given the choice of retiring or being fired or laid off, which constitutes an actionable discharge. Verbraeken v. Westinghouse, 881 F.2d 1041, 1047-48 (11th Cir. 1989) (affirming jury

verdict in favor of employee in ADEA case where employer gave him "'choice' between being laid off and accepting early retirement", finding jury could reasonably have concluded that his age was a determinative factor for his "being discharged"). Some cases refer to these situations as "constructive discharges." E.g., Rowell v. Bellsouth Corp., 433 F.3d 794 (11th Cir. 2005) (citing Young v. Southwestern Savings & Loan Association, 509 F.2d 140 (5th Cir. 1975); Downey v. Southern Natural Gas Co., 649 F.2d 302 (5th Cir. Unit B June 1981)). Others consider it an actual discharge. E.g., Stamey v. Southern Bell Tel. & Tel. Co., 859 F.2d 855, 860 (11th Cir. 1988) (forcing employee to choose between retirement and other jobs she considered demeaning were adverse actions regardless of whether they met the "constructive discharge" test), cert. denied, 490 U.S. 1116 (1989). In Stamey, the eleventh circuit said it made little difference whether giving an employee the choice between retiring or being terminated amounted to an actual versus constructive discharge. The employer's action can be considered actionable regardless. Stamey, 859 F.2d at 859-60.

The cases that consider the quit or be fired scenario a constructive discharge say the "test ... is 'whether a reasonable person in the employee's position would have felt compelled to resign.'" Rowell v. Bellsouth Corp., 433 F.3d 794 (11th Cir. 2005) (citing Downey v. Southern Natural Gas Co., 649 F.2d 302, 305 (5th Cir. Unit B June 1981) (reversing summary judgment in favor of employer where employee's supervisor advised him that he might be discharged and lose his stock benefits if he did not retire)); Welch v. University of Texas, 659 F.2d 531 (5th Cir. Unit A October 15, 1981) (affirming verdict for plaintiff where she resigned after her supervisor told her to leave, holding it was a constructive discharge as a "reasonable person would certainly resign employment after being ordered to leave"). Put otherwise, a constructive discharge occurs "when the offer presented was, at rock bottom, a choice between early retirement with benefits or

discharge without benefits, or, more starkly still, an impermissible take-it-or-leave-it choice between retirement or discharge." Rowell v. Bellsouth Corp., 433 F.3d 794, 805 (11th Cir. 2005) (quotation and citation omitted). In Rowell, the eleventh circuit said the mere possibility that the plaintiff may lose his job is not enough to place a reasonable person in the position of "quit or be fired." Id. In cases where severance or early retirement packages are being offered, if loss of a job is highly likely if the employee does not take the package, then a constructive discharge can be proven "if it is also shown that the employee would have kept a job with the company and declined the severance package if given a choice." Id.

3. RETALIATION CLAIMS.

The FCRA, like Title VII, also makes it unlawful to retaliate against anyone who has opposed unlawful employment discrimination, or who has made a charge or participated in any manner in an investigation under the FCRA.[9] E.g., Carter v. Health

[9] The pertinent language of the two retaliation provisions is nearly identical. The FCRA provides in pertinent part:

> (7) *It is an unlawful employment practice for an employer*, an employment agency, a joint labor-management committee, or a labor organization *to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.*

§§760.10(1)(a) & (7), Fla. Stat. (2011) (emphasis added). Title VII provides in pertinent part:

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. *It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment*, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, *to discriminate against any individual*, or for a labor organization to discriminate against any member thereof or applicant for membership, *because he has opposed any practice made an unlawful employment practice by this title* [42 USCS §§ 2000e-2000e-17], *or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title* [42 USCS §§ 2000e-2000e-17].

Mgmt. Assoc's., 989 So. 2d 1258 (Fla. 2d DCA 2008). Neither the FCRA nor Title VII contains the term "retaliation," instead stating it is unlawful to "discriminate" against someone who has made a complaint under the law. However, these claims are universally called "retaliation" claims.

In order to prevail on a retaliation claim, the plaintiff must show: (1) that she engaged in statutorily protected expression, (2) that she suffered an adverse employment action, and (3) a causal link between the protected expression and the adverse action. Lipphardt v. Durrango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1187 (11th Cir. 2001) (citing Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993)); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453 (11th Cir. 1998).

A. STATUTORILY PROTECTED EXPRESSION.

Both statutes provide protection under what is called the "participation clause" and the "opposition clause." Employees are protected from retaliation for actually filing charges of discrimination with the Florida Commission on Human Relations ("FCHR") or EEOC, or participating in an investigation by these agencies. This is commonly referred to as the "participation clause." Employees are also protected from retaliation if they complain about or otherwise object to any unlawful employment practice. This is commonly referred to as the "opposition clause." §760.10(7), Fla. Stat. (2011); 42 U.S.C. §2000e-3; see generally Crawford v. Metro. Gov't of Nashville & David County, Tennessee, 555 U.S. 271 (2009) (discussing participation and opposition clauses and holding that employee's participation in employer's internal investigation of discrimination was covered by the opposition clause); Carter v. Health Mgmt. Assoc's., 989 So. 2d 1258 (Fla. 2d DCA 2008) (discussing both types of protected activity); EEOC v. Total

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42 U.S.C. §2000e-3 (emphasis added).

Sys. Servs., Inc., 221 F.2d 1171 (11th Cir. 2000) (explaining difference in the participation clause and the opposition clause, which the court said is broader in coverage).

Internal complaints or grievances concerning discrimination or harassment constitute statutorily protected activity under the opposition clause. E.g., Carter, 989 So. 2d 1258; EEOC v. Total Sys. Servs., Inc., 221 F.2d 1171; Lipphardt v. Durrango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1187 (11th Cir. 2001) (statutorily protected expression includes opposing any unlawful employment practice by reporting to management that behavior constitutes sexual harassment); Johnson v. Booker T. Washington Broad. Serv., Inc., 234 F.3d 501, 509 (11th Cir. 2000) (statutorily protected expression includes complaining to superiors about sexual harassment); Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 n. 11 (11th Cir. 1993) (city's argument that complaint was not protected activity because it was just a "private conversation" was without merit) (citing Rollins v. State of Fla., Dep't of Law Enforcement, 868 F.2d 397, 400 (11th Cir. 1989) ("The protection afforded by the statute is not limited to individuals who have filed formal complaints, but extends as well to those, like [the plaintiff], who informally voice complaints to their superiors or who use their employers' internal grievance procedures.")); Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995) (complaining to management about sexual harassment and threatening lawsuit constitute actionable opposition).

Even complaining to someone outside of the place of employment can be considered protected activity. E.g., Scarbrough v. Bd. of Trustees Florida A & M Univ., 504 F.3d 1220 (11th Cir. 2007) (employee engaged in protected activity by reporting hostile faculty member to campus police); Williams v. Eckerd Family Youth Alt., 903 F. Supp. 1515 (M.D. Fla. 1995) (contacting sheriff's office about racist threat was

actionable opposition to discrimination). Similarly, complaining about treatment of others is protected activity. Ray v. Henderson, 217 F.3d 234 (9th Cir. 2000). Additionally, participating in an employer's own internal investigation of a complaint of discrimination is protected. EEOC v. Total Sys. Servs., Inc., 240 F.3d 899, 899 (11th Cir. 2001) (J. Edmondson, concurring) ("An employee who participates in an employer's own internal investigation of discrimination is within the scope of the opposition clause and can be protected by the clause: for example, an employer cannot throw up just a pretext and get away with punishing an employee for speaking out.").

The law does not require proof of the underlying discrimination in order to establish a retaliation claim for opposing the alleged discrimination. Lipphardt v. Durrango Steakhouse of Brandon, Inc., 267 F.3d 1183 (11th Cir. 2001) (citing Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993)). All that is required is a showing that the plaintiff had a good faith, reasonable belief that she was being subjected to unlawful discrimination or harassment when she engaged in protected activity. Id.

B. ADVERSE ACTION.

Any type of threat, harassment, or other adverse treatment is actionable retaliation if it is reasonably likely to deter protected activity by that individual or other employees. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57-61, 67 (2006) (rejecting discrimination standard for determining when an action is sufficiently adverse and instead adopting a broader standard to reach a wider range of employer conduct: whether the employer took a "materially adverse action" meaning whether the action would be harmful to the point that it might well dissuade a reasonable person from engaging in protected activity); Crawford v. Carroll, 529 F.3d 961, 973-74 (11th Cir. 2008) (same); Ray v. Henderson, 217 F.3d 1234, 1237 (9th Cir. 2000) (same). As the Seventh Circuit Court of Appeal explained:

> There is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint. It need only be an adverse employment action, as we have often held. [citations omitted] No one would question the retaliatory effect of many actions that put the complainant in a more unfriendly working environment: actions like moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services (like secretarial help or a desktop computer), or cutting off challenging assignments. Nothing indicates why a different form of retaliation--namely, retaliating against a complainant by permitting her fellow employees to punish her for invoking her rights under Title VII--does not fall within the statute. The law deliberately does not take a "laundry list" approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit. The instructions here correctly left the jury free to evaluate the record as a whole and to decide whether the State (in the person of the prison officials) retaliated against Knox for causing (by her invocation of Title VII rights) the demotion of the Lead Captain in the prison, by sitting on its hands in the face of the campaign of co-worker harassment about which it knew no later than May 7, 1992.

Knox v. Indiana, 93 F.3d 1327, 1334-35 (7th Cir. 1996) (hostile environment may be used to establish discrimination on the basis of protected activity (retaliation).

The standard for determining whether an action is sufficient adverse is objective and viewed "from the prospective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" Burlington at 71 (affirming finding that reassignment to more arduous tasks was materially adverse even though the tasks were within same job description). Some examples of actions short of ultimate employment actions that have been held to constitute "adverse actions" include:

- **retaliatory harassment**, Knox, 93 F.3d 1327; Troge v. J.C. Penney Company, Inc., 43 F. Supp. 2d 1343 (M.D. Fla. 1999) (retaliatory harassment is actionable); Ray v. Henderson, 217 F.3d 1234, 1237 (9th Cir. 2000) (plaintiff had a cognizable claim for retaliation based on supervisor's creation of hostile work environment); see also Poole v. Country Club of Columbus, Inc., 129 F.3d 551 (11th Cir. 1997) ("Stripped of all responsibility, given only a chair and no desk,

and isolated from conversations with other workers, Poole has presented evidence suggesting that a reasonable person might find the conditions under which she was working intolerable. Consequently, viewing the evidence in the light most favorable to the plaintiff, we hold that genuine issues of material fact exist as to whether plaintiff was constructively discharged.");

- **continuing the harassment or discrimination the employee complained of**, Howard v. Board of Educ. of Sycamore Comm. Unit Sch. Dist. No. 427, 876 F. Supp. 959 (N.D. Ill. 1995) (plaintiff who complained of sexual harassment suffered adverse actions when she was subjected to further harassment and when she was told heads would roll if she continued in her complaints);
- **undesirable reassignments or transfers**, Preda v. Nissho Iwai Am. Corp., 128 F.3d 789 (3d Cir. 1997) (downgrading of job duties constituted actionable retaliation even though there were no adverse pecuniary consequences); Hampton v. Borough of Tinton Falls Police Dept., 98 F.3d 107 (3d Cir. 1996) (hostile transfer was actionable even though employer claimed it was just part of routine scheduling); Davis v. Sioux City, 115 F.3d 1365 (8th Cir. 1997) (reversing summary judgment where plaintiff claimed transfer was hostile because it lacked supervisory status, but employer pointed to increased salary with transfer, holding whether action was retaliatory was a jury question);
- **closer scrutiny**, Harrison v. Metro Government of Nashville, 80 F.3d 1107, 1119 (6th Cir.) (closer scrutiny of an employee who has complained is actionable), cert. denied 519 U.S. 863 (1996); Anderson v. Davila, 125 F.3d 148 (3d Cir. 1997) (same);
- **implied or overt threats not to pursue complaints, and requesting that the complaint be dropped**, Howard, 876 F. Supp. 959 (implied threats not to pursue

complaints actionable); Ray v. Tandem Computers, Inc., 63 F.3d 429 (5th Cir. 1995) (same);

- **denial of a promotion**, Curl v. Reavis, 740 F.2d 1323 (4th Cir. 1984) (denial of promotion for refusing to drop charge of discrimination was actionable retaliation even though plaintiff lacked a training prerequisite for position);
- **disciplinary actions such as written reprimands**, Johnson v. Demario, 14 F. Supp.2d 107 (D. D.C. 1998) (written reprimand placed in personnel file was an adverse action); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998) (written reprimands, an employer's solicitation of negative comments by co-workers, and a one-day suspension constituted adverse employment actions);
- **negative job references**, Smith v. St. Louis Univ., 109 F. 3d 1261, 1266 (8th Cir. 1997) (jury question existed as to whether negative comment to plaintiff's prospective employer was in retaliation for her complaints);
- **not following the employer's own procedures for improving the employee's performance**, Cosgrove v. Sears, Roebuck & Co., 9 F. 3d 1033 (2d Cir. 1993) (failure of employer to follow its own procedures for addressing employee performance deficiencies before terminating plaintiff was actionable retaliation).

Moreover, even if certain actions would not be sufficient to constitute adverse actions when considered separately, they may still be considered sufficient to constitute an adverse action when considered collectively. The totality of the circumstances must be considered in evaluating a retaliation claim. Vance v. Southern Bell Tel. &Tel. Co., 863 F.2d 1503, 1510-11 (11th Cir. 1989) (retaliation claim is "a single cause of action rather than a sum total of a number of mutually distinct causes of action to be judged each on its own merits."); EEOC v. Reichold Chem., Inc., 988 F. 2d 1564, 1572 (11th

Cir. 1993) (the cumulative effect of employment actions established an adverse action); Knox v. Indiana, 93 F.3d 1327, 1334-35 (7th Cir. 1996) (jury instructions correctly left the jury free to evaluate the record as a whole and decide whether the State, in the person of the prison officials, retaliated against Knox). As the eleventh circuit explained:

> We join the majority of circuits which have addressed the issue and hold that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. The Fifth and Eighth Circuits' contrary position is inconsistent with the plain language of *42 U.S.C. § 2000e-3*(a), which makes it "unlawful to *discriminate* against any of his employees ... because he has made a charge ..." (emphasis added). Read in the light of ordinary understanding, the term "discriminate" is not limited to "ultimate employment decisions." Moreover, our plain language interpretation of *42 U.S.C. § 2000e-3*(a) is consistent with Title VII's remedial purpose. Permitting employers to discriminate against an employee who files a charge of discrimination so long as the retaliatory discrimination does not constitute an ultimate employment action, could stifle employees' willingness to file charges of discrimination.
>
> Although we do not doubt that there is some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause, we need not determine in this case the exact notch into which the bar should be placed. **It is enough to conclude, as we do, that the actions about which Wideman complains considered collectively are sufficient to constitute prohibited discrimination.** We need not and do not decide whether anything less than the totality of the alleged reprisals would be sufficient. Accordingly, for judgment as a matter of law purposes, Wideman's evidence satisfied the adverse employment action requirement for a prima facie case of retaliation.

Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998) (emphasis added) (holding that the actions complained of were sufficient when considered collectively to constitute prohibited discrimination regardless of whether anything less than the totality of the alleged reprisals were sufficient in and of themselves).

C. CAUSAL CONNECTION.

Due to the purpose behind the statutes' anti-retaliation provisions, the causation requirement for retaliation claims is more relaxed than that for discrimination claims as well even though both statutory provisions use the term "because." To establish the

causal relation element of a retaliation claim, the plaintiff need only show "that the protected activity and the adverse action are not **completely unrelated**." Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998) (emphasis added); Farley v. Nationwide Mut. Ins. Co., 197 F. 3d 1322 (11th Cir. 1999) (plaintiff need only demonstrate "'that the protected activity and the adverse action were not *wholly unrelated*.'"); Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993) (same); EEOC v. Reichhold Chem., Inc., 988 F.2d 1564, 1571-72 (11th Cir.1993) ("This court has interpreted the causal link requirement broadly; a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated."). As the eleventh circuit explained:

> We do not construe the "causal link" ... to be the sort of logical connection that would justify a prescription that the protected participation in fact prompted the adverse action. Such a connection would rise to the level of direct evidence of discrimination, shifting the burden of persuasion to the defendant. Rather, we construe the "causal link" element to require merely that the plaintiff establish that the protected activity and the adverse action were not wholly unrelated.

Simmons v. Camden County Bd. of Educ., 757 F.2d 1187, 1189 (11th Cir.), cert. denied, 474 U.S. 981 (1985). Thus, as with discrimination claims, it is not necessary to show that the plaintiff's protected activity was the sole reason for defendant's actions. Plaintiff may establish retaliation by showing defendant was motivated by retaliatory animus even if valid objective reasons also motivated defendant's actions. Id.

4. DISABILITY DISCRIMINATION CLAIMS.

Disability discrimination claims involve many issues other discrimination claims do not. For example, discrimination claims involve issues as to whether the plaintiff is considered disabled as defined by the law, which includes determining whether the plaintiff has an actual disability, a record of a disability, or was perceived by the employer as disabled, as well as whether there were any reasonable accommodations

the employer could have provided for an actual disability. Due to the unique issues involved in many disability cases, they require unique jury instructions that are specifically tailored to the precise type of claim brought. Similarly, the burdens applicable to disability discrimination claims differ depending upon whether it is the failure to accommodate or disparate treatment claim. Nadler v. Harvey, Case No. 06-12692, 19 A.D. Cases 1084 (11th Cir. 2007) (unpublished) (explaining the burden-shifting analysis applies to disparate treatment claim but not failure to accommodate claim). Where there is a failure to accommodate, no showing of discriminatory animus or intent is required at all.[10] Nadler, Case No. 06-12692 (citing Lucas v. W.W. Grainger, Inc., 257 F. 3d 1249, 1255 (11th Cir. 2001)). Where there is an adverse action, the McDonnell Douglas burden-shifting analysis applies and, ultimately, the issue is whether the plaintiff's disability was a determining factor in the adverse action. Nadler, Case No. 06-12692 (citing Ellis v. England, 432 F.3d 1321 (11th Cir. 2005)).

Moreover, because there is very little case law interpreting the ADAAA amendments to date, drafting model jury instructions for disability cases at this juncture is problematic. As such, model instructions for disability claims are not being submitted at this point. It is recommended that disability instructions be addressed separately once the other model employment discrimination instructions are solidified.

[10] To establish discrimination by failure to make a reasonable accommodation, the plaintiff need only show that: 1) she was disabled; 2) she was otherwise qualified; and 3) a reasonable accommodation was not provided. Nadler, Case No. 06-12692 (citing Lucas v. W.W. Grainger, Inc., 257 F. 3d 1249, 1255 (11th Cir. 2001)); Steward v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285 (11th Cir. 1997). Once the plaintiff makes this showing, the employer is liable unless it asserted an undue hardship, which is an affirmative defense. Nadler, Case No. 06-12692 (citing Willis v. Conopco, Inc., 108 F.3d 282, 286 (11th Cir. 1997)); Holly v. Clairson Indus., LLC., 492 F.3d 1247, 1262 (11th Cir. 2007) ("an employer's failure to reasonably accommodate a disabled individual itself constitutes discrimination under the ADA, so long as that individual is 'otherwise qualified,' and unless the employer can show undue hardship").

5. DAMAGES.

The remedial purpose of the FCRA, like Title VII, is to make victims of unlawful discrimination whole again. To accomplish this purpose, the FCRA and Title VII both vest "broad equitable discretion" in the tribunal to fashion "the most complete relief possible." Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1526 (11th Cir. 1991). A victim of discrimination is entitled to whatever employment opportunities she was unlawfully divested of and should be restored to those opportunities. Nord v. U.S. Steel Corp., 758 F.2d 1462, 1473 (11th Cir. 1985). The following is an overview of the types of damages the Courts typically submit to the jury for a determination or at least an advisory verdict.

A. LOST WAGES & BENEFITS.

Both Title VII and the FCRA authorize the recovery of lost wages and benefits (back pay and front pay).[11] §760.11(5), Fla. Stat. (2011); 42 U.S.C. §2000e-5(g). A victim of discrimination is **presumptively entitled to back pay as well as front pay.**[12] Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527-29 (11th Cir. 1991). The presumption in favor of awarding back and front pay is strong, and arises for two primary reasons. First, Title VII was designed to

[11] The definition of "back pay" is very broad and includes things such as the value of vacation, employer pension and profit-sharing contributions, stock options, sick leave pay, bonuses, medical insurance coverage and expenses, life insurance, and any other monetary loss resulting from the discrimination. E.g., Pettaway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) (vacation); Patterson v. Merican Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976) (pension and profit-sharing); Scarfo v. Cabletron Sys., Inc., 54 F.3d 931 (1st Cir. 1995) (stock); Satty v. Nashville Gas Co., 522 F. 2d 850, 855 (6th Cir. 1975) (sick leave); Bowe v. Colgate-Palmolive Co., 489 F.2d 896 (7th Cir. 1973) (bonuses); Shattuck v. Kenetic Concepts, Inc., 489 F.2d 896 (5th Cir. 1995) (medical insurance and expenses). Both Title VII and the FCRA allow for recovery of back pay liability for up to two years prior to the filing of the charge. §760.11(9), Fla. Stat. (2011); §2000e-5(g)(1)).

[12] What has come to be known as "front pay" is really the same thing as back pay but runs from the date after judgment into the future as opposed to the lost wages incurred from the date of the discriminatory action up to the judgment. As the eleventh circuit explained in Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527 (11th Cir. 1991), "back pay and front pay are not independent and severable items of damages. They are each part of the remedy the court is charged with fashioning, a remedy that, as a whole, achieves the remedial purposes of the Act." Id. at 1529.

achieve equality of employment opportunities and to remove barriers, and those goals are enhanced by the "reasonably certain prospect" of a back pay award to provide incentive for employers to voluntarily eliminate discriminatory practices. Second, Title VII is designed to make victims of discrimination whole. "It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Albermarle, 422 U.S. at 419-20 (rejecting denial of back pay where discrimination was not in "bad faith"). Thus, "[o]nce discrimination is proved, a presumption of entitlement to back pay and individual injunctive relief arises. The burden of proof then shifts to the employer to show by "clear and convincing evidence" that the plaintiff would not have received the employment opportunity even absent discrimination. McCormick v. Attala County Bd. of Educ., 541 F.2d 1094, 1095 (5th Cir. 1976); accord Nord v. U.S. Steel Corp., 758 F.2d 1462, 1473 (11th Cir. 1985); Lewis v. Smith, 731 F.2d 1535, 1538 (11th Cir. 1984); NAACP v. City of Evergreen, 693 F.2d 1367, 1370 (11th Cir. 1982).

As such, denials of lost wages and benefits are "exceedingly rare." Thurman v. Yellow Freight Sys., Inc., 90 F. 3d 1160 (6th Cir.), modified on other grounds, 97 F.3d 833 (6th Cir. 1996). For instance, it is not proper to deny lost wages simply because they are speculative. Lathem v. D.C.F., 172 F.3d 786, 794 (11th Cir. 1999) (citing Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260-61 (5th Cir. 1974), cert. denied, 439 U.S. 1115 (1979)); Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1975); Hairston v. McLean Trucking Co., 520 F. 2d 226 (4th Cir. 1975); Meadows v. Ford Motor Co., 510 F. 2d 939 (6th Cir. 1975). As the Supreme Court recognized long ago, back pay determinations inevitably involve recreating the conditions that would have existed absent the unlawful discrimination, and "this process of recreating the past will

necessarily involve a degree of approximation and imprecision." International Bhd. of Teamsters v. United States, 431 U.S. 324, 372 (1972). Therefore, courts resolve uncertainties in back pay in favor of the discrimination victim. Lathem, 172 F.3d at 794; Pettway, 494 F.2d at 260-61; Jenson, 130 F.3d 1287; Hairston, 520 F. 2d 226; Meadows, 510 F. 2d 939. "The risk of lack of certainty with respect to projections of lost income must be borne by the wrongdoer, not the victim." Goss v. Exxon Office Sys. Co., 747 F.2d 885, 889 (3d Cir. 1984); Joe's Stone Crab, 15 F. Supp. 2d 1364 (S.D. Fla. 1998); Johnson v. Spencer Press of Maine, Inc., 364 F.3d 368, 379 (1st Cir. 2004). Where precision in computing back pay is not possible, the fact finder should award the maximum which the employment discrimination victim could have earned. Pettway, 494 F.2d 211, 260-61 (citing Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969)); see also Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985) (affirming district court's use of highest salary comparator to compute back pay).

The amount of back pay to be awarded during any given period should take into consideration discriminatory acts that occurred before the actionable time period. E.g., Crawford v. Western Elec. Co., 614 F.2d 1300 (5th Cir. 1980);[13] Miller v. Miami Prefabricators, Inc., 438 F. Supp. 176 (S.D. Fla. 1977). As one court aptly explained:

> When discrimination continues over time, as it did at GPO, the harms it causes are compounded. An employee denied a raise in one year will fall further behind if raises in subsequent years are a function of prior salaries. Likewise, an employee denied a promotion in a given year may be frozen out of additional promotional opportunities, unless the missed rung on the promotion ladder is somehow replaced. When the effects of illegal discrimination are compounded, basing the plaintiffs' compensation only on events within the two-year accrual period seriously shortchanges their recovery for the harm actually suffered during the accrual period itself.

[13] The eleventh circuit adopted as precedent all former fifth circuit decisions rendered prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

Thompson v. Sawyer, 678 F.2d 257, 290 (D.C. Cir. 1982) (citing, among other authorities, Crawford v. Western Elec. Co., 614 F.2d 1300 (5th Cir. 1980)).

It is not the plaintiff's burden to prove what would have happened absent the discrimination. Rather, it is the employer's burden to prove what would have happened absent the discrimination. In re Pan Am. World Airways, 905 F.2d 1457, 1464 (11th Cir. Fla. 1990). As the eleventh circuit explained:

> At the time of trial, it is difficult for one who has allegedly suffered discrimination to recreate the past, that is, to demonstrate what would have happened in the absence of discrimination. All of the employee's actions were taken against the backdrop of a discriminatory policy; her state of mind and attitudes developed in response to the atmosphere of discrimination created by her employer. Not only would requiring plaintiffs like White to prove how they would have behaved in the face of a nondiscriminatory policy sometimes demand the impossible; it would also often be inequitable. It is the employer who created the discriminatory situation that unlawfully circumscribed the employee's choices [footnote omitted] and whose past conduct makes it difficult to ascertain, after the fact, how the employee would have behaved in a nondiscriminatory environment. [footnote omitted]
>
> Relying on such prudential and equitable considerations, we have refused, in cases analogous to the one presently before us, to condition the employee's entitlement to relief on her proving what would have happened in the absence of discrimination. [footnote omitted]

In re Pan Am. World Airways, 905 F.2d 1457, 1464 (11th Cir. 1990) (emphasis added).

B. COMPENSATORY DAMAGES.

Both federal and state statutes authorize a prevailing plaintiff to recover for his or her emotional injuries due to discrimination. §760.11(5), Fla. Stat. (2011) (a victim of discrimination is entitled to recover "damages for mental anguish, loss of dignity, and any other intangible injuries").[14] The only difference is that, under the state law,

[14] Proof of emotional distress includes things such as:

- differences in the plaintiff's health and/or behavior before versus after the unlawful action
- aggravation of preexisting physical or mental conditions
- damage to the plaintiff's reputation and career
- humiliation
- loss of pride

compensatory damages are not limited by the statute, §760.11(5), Fla. Stat. (2011), whereas under the federal law, compensatory and punitive damages are capped at a combined total of $300,000.00.

Despite the lack of any statutory cap on compensatory damages claims under the state law, state courts have required remittitur of damages awards they consider excessive. E.g., Ernie Haire Ford, Inc. v. Atkinson, 64 So. 2d 131 (Fla. 2d DCA 2011) ($3,579,66 award for past and future pain and suffering "was excessive as a matter of law" where the plaintiff presented "no proof of physical injury or emotional pain and suffering due to age discrimination") (citing City of Hollywood v. Hogan, 986 So. 2d 634 (Fla. 4th DCA 2008) (holding $1.1 million award "shock[ed] the judicial conscience" in what it considered a "typical" age discrimination case and that noneconomic damages should not exceed the $5,000-30,000 range where there is no physical injury and no medical or psychological evidence of emotional pain and suffering)). These state cases, though, go against the greater weight of authority in federal discrimination claims which hold that no medical testimony is needed to support substantial awards for emotional distress. E.g., Bogle v. McClure, 332 F.3d 1347 (11th Cir. 2003) (affirming compensatory damages awards of $500,000 to each of the plaintiffs, who were white librarians, based upon their own uncorroborated testimony of their "upset," "embarrassment," "humiliation" and "shame" at being transferred to "dead end" jobs which, although gave them the

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- loss of self-respect
- loss of confidence
- loss of dignity in being permitted to tell one's side or in being believed
- loss of the pleasure of association with friends and colleagues at work
- loss of pleasure in career or professional achievements
- loss of community or social standing
- loss of belief in the American dream of equality
- loss of position in the family

same pay, effectively destroyed their careers after they had worked for decades as librarians).

The federal courts have long held that the injury caused by discrimination is inherent and causes grave harm. For example, the United States Supreme Court said: "It is beyond question that discrimination in employment on the basis of sex, race, or any of the other classifications protected by Title VII is, as respondents argue and this Court consistently has held, an invidious practice that causes grave harm to its victims." United States v. Burke, 504 U.S. 229, 238 (1992) (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)); accord Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1348 (11th Cir. 2000) ("Because illegal discrimination qualifies as such a condemnable intentional act, the emotional and dignitary harms it can cause are neither unforeseeable nor particularly enigmatic.").

"With respect to emotional distress, a plaintiff must demonstrate that an ordinarily sensitive person could have suffered the alleged harm. If the plaintiff meets this burden, then the defendant must 'take the victim as he finds her, extraordinarily sensitive or not.'" McKinnon v. Kwong Wah Rest., 83 F. 3d 498, 506 (1st Cir. 1998) (citations omitted); accord Jenson v. Taconite Co., 130 F. 3d 1287 (8th Cir. 1997), cert. denied sub nom, Ogelbay Norton Co. v. Jenson, 524 U.S. 953 (1998). If the defendant asserts that some of the plaintiffs' damages stem from a prior "injury," then the "burden is on the defendant to establish a causal relationship between the prior injury and the damages claimed by the plaintiffs." Id. "If the court finds it impossible to apportion the damages, then the defendants are liable for the entire amount." Id.

As the eleventh circuit recently explained:

> Although compensatory damages must be proven, general compensatory damages, as opposed to special damages, need not be proved with a high degree of specificity and may be inferred from the circumstances.

> *Ferrill v. Parker Group, Inc., 168 F.3d 468, 476 (11th Cir. 1999).* "A plaintiff may be compensated for intangible, psychological injuries as well as financial, property, or physical harms." *Id.* "Humiliation and insult are recognized, recoverable harms," and a plaintiff's own testimony of embarrassment and humiliation can be sufficient to support an award for compensatory damages. *Id.* (citing *Marable v. Walker, 704 F.2d 1219, 1220 (11th Cir. 1983)).*

Bogle, 332 F.3d at 1359.

C. PUNITIVE DAMAGES.

To recover punitive damages under federal law, a complaining party must show that the employer engaged in discriminatory practices with malice or with reckless indifference to federally protected rights. See 42 U.S.C. §1981a(b)(1). Under this standard, "malice" and "reckless indifference" refer not to the egregiousness of the employer's conduct, but to the employer's knowledge that it may be acting in violation of federal law. Kolstad v. American Dental Association, 527 U.S. 526, 536 (1999). The focus is on the actor's state of mind. Id. at 535. An employer would not have the requisite state of mind if he was "unaware of the relevant federal prohibition" or acted "with the distinct belief that its discrimination is lawful." Id. at 537. Under Kolstad, malice may be imputed to the employer if the employee who committed the unlawful act is serving in a "managerial capacity" and "acting in the scope of employment." Id. at 543 (citation omitted).[15]

It is still unclear whether Florida courts will apply the federal standard to FCRA cases, or the state law standard. Speedway SuperAmerica, LLC v. DuPont, 933 So.2d 75 (Fla. 5th DCA 2006) (discussing differences in state and federal standards for

[15] Kolstad rejected the holding in cases such as Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317 (11th Cir. 1999), which required plaintiffs to show egregious conduct and "either that the discriminating employee was 'high[] up the corporate hierarchy,' or that 'higher management' countenanced or approved [his] behavior." Id. at 1323 & n.8. Dudley held that Wal-Mart store managers were not sufficiently high in the corporate hierarchy to sustain an award of punitive damages. Kolstad and its progeny, however, endorsed a far more flexible understanding of "managerial capacity."

punitive damages awards), review dismissed 955 So. 2d 533 (Fla. 2007). As the fifth district recognized, the FCRA does not explicitly require malice or reckless indifference for an award of punitive damages like Title VII does. Speedway, 933 So. 2d at 89-90.

The amount of punitive damages may exceed the actual damages considerably. Bogle v. McClure, 332 F.3d 1347 (11th Cir. 2003) (affirming punitive damages of $2,000,000 to each plaintiff transferred because they were white, and compensatory damages awards of $500,000 to each of the plaintiffs). According to Fla. Stat. 760.11(5), punitive damages are capped at $100,000.[16]

6. AFFIRMATIVE DEFENSES.

A. THE SAME DECISION DEFENSE.

Whether or not the same decision defense will be available under the FCRA after Gross is an open question. If the split of authority on whether the FCRA covers pregnancy discrimination is any indication, the issue is likely to confound judges and lawyers for years to come. Much like the FCRA does not explicitly address whether pregnancy discrimination is considered a form of sex discrimination under state law, the FCRA does not explicitly address whether the mixed motive or same decision defense is available under state law. In both situations, Congress amended Title VII but the Florida legislature did not follow suit by amending the FCRA.

State and federal courts have been struggling with the issue of whether pregnancy discrimination is covered by the FCRA since at least 1991, when Florida's First District Court of Appeal decided O'Loughlin v. Pinchback, 579 So.2d 788 (Fla. 1st DCA 1991). In that case, the court traced the history of pregnancy-discrimination law, noting that, after the United States Supreme Court held in 1976 that pregnancy

[16] Fla. Stat. 760.11(5), "...The judgment for the total amount of punitive damages awarded under this section to an aggrieved person shall not exceed $100,000."

discrimination was not sex discrimination under Title VII, Congress amended Title VII in 1978 by enacting the Pregnancy Discrimination Act ("PDA") to specifically amend Title VII to say that pregnancy discrimination is sex discrimination. However, the Florida legislature did not similarly amend the Florida Human Rights Act ("FHRA") – the predecessor to the FCRA – to specifically include pregnancy discrimination. The Court then concluded that Title VII preempted the FHRA in the pregnancy-discrimination realm "to the extent that Florida's law offers less protection to its citizens than does the corresponding federal law." The court thus afforded recovery on a pregnancy discrimination claim that had apparently been brought solely under the FHRA and not Title VII.

Ever since, courts have been split on what Pinchback meant and/or whether it was correct. E.g., Carter v. Health Mgmt. Assoc's., 989 So. 2d 1258 (Fla. 2d DCA 2008) (discussing split of authority on the issue). In 2008, the fourth district held that the FCRA covers pregnancy after all, because the PDA merely amended Title VII to include pregnancy as Congress had intended in the first place. Carsillo v. City of Lake Worth, 995 So. 2d 1118 (Fla. 4th DCA 2008) (holding FCRA prohibits discrimination based on pregnancy as sex discrimination, even though it was not amended, as was the nearly identically worded federal civil rights act, to specify that pregnancy discrimination was prohibited; federal amendment clarified that Congress had intended to outlaw pregnancy discrimination when it originally enacted the civil rights act, and Florida statute was patterned after federal statute).

The courts thus far have similarly interpreted the FCRA to cover many disability issues even though it does not include much of the language from either the Rehab Act or the ADA. For example, cases thus far have interpreted the FCRA to follow the same definition of "disability" from federal law even though the FCRA did not include any of the

same definitions of "handicap," and have interpreted the FCRA to require reasonable accommodation just like the federal law even though no such language appears in the state statute. E.g., Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994) (interpreting FCRA in accordance with Section 504 of the Rehab Act and applying the same definitions and requirement for reasonable accommodation); Wimberly v. Securities Technologies Group, Inc., 866 So. 2d 146 (Fla. 4th DCA 2004) (interpreting FCRA in accordance with the ADA).

Thus, whether or not the same decision defense is available under the FCRA is unclear. A brief history of the defense will demonstrate that, as with the issue of pregnancy discrimination, the federal law was amended to expressly include the same decision defense, but the FCRA was not so amended.

The defense began with the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989), which interpreted Title VII to allow what is known as the "same decision" defense. In Price Waterhouse, a plurality of the Supreme Court recognized that an employer may violate the discrimination prohibition of Title VII when it relies upon one of the grounds that the statute forbids employers from considering in employment decisions (i.e., race, color, religion, sex, or national origin), even if the proscribed criterion was not the sole reason for the employer's decision. Price Waterhouse at 241 ("Title VII [was] meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."); Gross, 129 S. Ct. at 2349. However, attempting to respect the balance Congress struck between eliminating invidious employment discrimination and preserving an employer's prerogative to employ whomever it wishes, the Court's majority also held that an employer would bear no liability for a mixed-motive employment decision if it would have made the same decision absent the illegal motive. Price Waterhouse at 242 (plurality); id. at 261 (White, J.,

concurring in the judgment); Id. at 261, 279 (O'Connor, J., concurring in the judgment). The Court held that once a plaintiff shows that gender played a "motivating part in an employment decision, the defendant may avoid a finding of liability only by providing that it would have made the same decision even if it had not allowed gender to play such a role", thus creating the same decision "affirmative defense." Price Waterhouse at 244-46.

To prevail on the same decision defense, the employer must show that its legitimate reason, standing alone, would have induced it to make the same decision. Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) ("once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role"); Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993) (holding defendant could not prevail on same decision defense where there was no evidence of any legitimate nondiscriminatory reason, explaining that, to prevail on such a defense, the employer "must show that its legitimate reason, standing alone, would have induced it to make the same decision") (quoting Steger v. General Electric Co., 318 F.3d 1066, 1075 (11th Cir. 2003) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989))). In other words, proving "'that the same decision would have been justified ... is not the same as proving that the same decision would have been made.'" Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (citations omitted). "An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason." Price Waterhouse, 490 U.S. at 252.

After Price Waterhouse, Congress enacted the Civil Rights Act of 1991, which amended Title VII to explicitly authorize mixed motive discrimination claims. 42 U.S.C. §2000e-2(m). It also overruled Price Waterhouse's holding that the same decision defense would be a defense to liability and instead said it would only limit the remedies available. 42 U.S.C. §2000e-5(g)(2)(B).

Understandably, many lower courts applied the same decision defense to all types of discriminatory and retaliatory actions because they all used the same "because of" language Title VII originally used for discrimination claims. E.g., Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993) (holding defendant could not prevail on same decision defense to retaliation claim – although it does not appear that the parties disputed the availability of the defense); Pennington v. City of Huntsville, 261 F. 2d 1262 (11th Cir. 2001) (holding same decision defense was still available in retaliation cases under Price Waterhouse even though Congress overruled it in part with respect to discrimination claims brought under Title VII). However, Gross said that these decisions were wrong, at least in the case of the ADEA, because Congress did not amend the ADEA after the Price Waterhouse decision. Gross, 129 S. Ct. at 2349. Thus, Gross concluded that Congress had decided not to authorize mixed motive claims in age discrimination cases. Gross, 129 S. Ct. at 2349. Instead, the Court reasoned that the "because of" language of the ADEA means the plaintiff must show that age was the "reason" that the employer decided to act. Gross, 129 S. Ct. at 2350 (citations omitted). In other words, to prevail on a claim of disparate treatment under the ADEA, "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." Id. Consequently, the burden-shifting framework that the Court had set forth in Price Waterhouse does not apply in ADEA cases. Id. at 2349-50. As such, there is no "same decision" defense and such a jury instruction is never proper in an ADEA case. Gross,

129 S. Ct. at 2346-49. Rather, under the ADEA, the "plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the 'but for' cause of the challenged employer decision." In other words, the plaintiff must show that the defendant terminated her "because of" age, meaning that age "had a determinative influence on the outcome." Gross at 2350 (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).[17]

Thus, for instance, after Gross, the eleventh circuit reversed a summary judgment in favor of an employer based upon its same decision defense, explaining that, "[b]ecause an ADEA plaintiff must establish 'but for' causality, no 'same decision' affirmative defense can exist: the employer either acted 'because of' the plaintiff's age or it did not." Mora v. Jackson Memorial Foundation, Inc., 597 F.3d 1201, 1204 (11th Cir. 2010) (citing Gross, 129 S. Ct. at 2352); see also Bogle v. McClure, 332 F.3d 1347, 1357 (11th Cir. 2003) (affirming trial court's refusal to give defendant's mixed motive jury instruction and interrogatory in a race discrimination case where the district court's proximate cause instruction and interrogatory cured any potential error because the jury clearly found that race discrimination was the proximate cause of the plaintiffs' damages and thus precluded any potential mixed motive finding).

Although Gross construed the ADEA, the FCRA as well as several other federal discrimination statutes were never amended to expressly incorporate the mixed motive framework either. Thus, whether the same decision defense will remain available under the FCRA and similar statutes is questionable. See, e.g., Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010) (holding that because Congress did

[17] The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, ***because of*** such individual's age". 29 U.S.C. §623(a)(1) (emphasis added).

not amend ADA retaliation provision to include mixed-motive language, there is no same decision defense available in a retaliation claim brought under the ADA after Gross).

B. THE MITIGATION DEFENSE.

Failure to mitigate is an affirmative defense a defendant may prove to limit the recovery of lost wages and benefits. To avail itself of this defense, the employer must prove (1) that the damage suffered by plaintiff could have been avoided, which generally means that there were substantially equivalent positions available which plaintiff could have discovered and for which he was qualified and (2) that plaintiff failed to use reasonable diligence in seeking such a position. Smith v. American Service Co. of Atlanta, Inc., 796 F.2d 1430 (11th Cir. 1986) ("The burden of proving lack of diligence is on the defendant once a Title VII plaintiff has established damages resulting from the discriminatory acts of the employer.") (citing Marks v. Prattco, 633 F.2d 1122, 1125 (5th Cir. 1981) (Unit A) ("Once a plaintiff in a Title VII case has established a *prima facie* case and established what he or she contends to be the damages resulting from the discriminatory acts of the employer, the burden of producing further evidence on the question of damages in order to establish the amount of interim earnings or lack of diligence properly falls to the defendant."). Respondent must meet this burden to overcome the presumption that a victim of discrimination is entitled to back pay as well as front pay. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527-29 (11th Cir.1991); see generally Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) (A plaintiff has no duty to take a job that is inferior in status or pay in order to mitigate damages); Durden v. R.H. Boulingny, Inc., 22 FEP 1455 (N.D. Fla. 1979) (although defendants proved inadequate effort to seek employment, they failed to prove she would have been successful in securing employment more lucrative than minimum wage); accord Odima v. Westin Tucson Hotel, 53 F.3d 1484, (9th Cir.

1995) (affirming back pay award where empoyer presented no evidence as to the availability of comparable employment).

If the defendant proves that the plaintiff failed to mitigate her damages, it normally reduces but does not eliminate the plaintiff's recovery for back pay. 42 U.S.C. §2000e-5(g) ("interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."); e.g., Shore v. Federal Express Corp., 42 F.3d 373 (6th Cir. 1994) (recognizing tribunal has discretion to reduce rather than cut off damages for failure to mitigate because back and front pay are equitable remedies). Typically, the plaintiff recovers the difference in the amount she could have earned by mitigation versus what she would have made working for the defendant absent discrimination. Shore, 42 F.3d at 378; 42 U.S.C. §2000e-5(g).

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[i] The full provision reads:

> **(1) It is an unlawful employment practice for an employer:**
>
> **(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.**
>
> (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
>
> (2) It is an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of race, color, religion, sex, national origin, age, handicap, or marital status or to classify or refer for employment any individual on the basis of race, color, religion, sex, national origin, age, handicap, or marital status.
>
> (3) It is an unlawful employment practice for a labor organization:
>
> (a) To exclude or to expel from its membership, or otherwise to discriminate against, any individual because of race, color, religion, sex, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

(c) To cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(4) It is an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of race, color, religion, sex, national origin, age, handicap, or marital status in admission to, or employment in, any program established to provide apprenticeship or other training.

(5) Whenever, in order to engage in a profession, occupation, or trade, it is required that a person receive a license, certification, or other credential, become a member or an associate of any club, association, or other organization, or pass any examination, it is an unlawful employment practice for any person to discriminate against any other person seeking such license, certification, or other credential, seeking to become a member or associate of such club, association, or other organization, or seeking to take or pass such examination, because of such other person's race, color, religion, sex, national origin, age, handicap, or marital status.

(6) It is an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee to print, or cause to be printed or published, any notice or advertisement relating to employment, membership, classification, referral for employment, or apprenticeship or other training, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, national origin, age, absence of handicap, or marital status.

(7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

(8) Notwithstanding any other provision of this section, it is not an unlawful employment practice under ss. 760.01-760.10 for an employer, employment agency, labor organization, or joint labor-management committee to:

(a) Take or fail to take any action on the basis of religion, sex, national origin, age, handicap, or marital status in those certain instances in which religion, sex, national origin, age, absence of a particular handicap, or marital status is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.

(b) Observe the terms of a bona fide seniority system, a bona fide employee benefit plan such as a retirement, pension, or insurance plan, or a system which measures earnings by quantity or quality of production, which is not designed, intended, or used to evade the purposes of ss. 760.01-760.10. However, no such employee benefit plan or system which measures earnings shall excuse the failure to hire, and no such seniority system, employee benefit plan, or system which measures earnings shall excuse the involuntary retirement of, any individual on the basis of any factor not related to the ability of such individual to perform the particular employment for which such individual has applied or in which such individual is engaged. This subsection shall not be construed to make unlawful the rejection or termination of employment when the individual applicant or employee has failed to meet bona fide requirements for the job or position sought or held or to require any changes in any bona fide retirement or pension programs or existing collective bargaining agreements during the life of the contract, or for 2 years after October 1, 1981, whichever occurs first, nor shall this act preclude such physical and medical examinations of applicants and employees as an employer may require of applicants and employees to determine fitness for the job or position sought or held.

(c) Take or fail to take any action on the basis of age, pursuant to law or regulation governing any employment or training program designed to benefit persons of a particular age group.

(d) Take or fail to take any action on the basis of marital status if that status is prohibited under its antinepotism policy.

(9) This section shall not apply to any religious corporation, association, educational institution, or society which conditions opportunities in the area of employment or public accommodation to members of that religious corporation, association, educational institution, or society or to persons who subscribe to its tenets or beliefs. This section shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporations, associations, educational institutions, or societies of its various activities.

(10) Each employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice provided by the commission setting forth such information as the commission deems appropriate to effectuate the purposes of ss. 760.01-760.10.

§760.10, Fla. Stat. (2011).

Florida Civil Rights Act of 1992
EMPLOYMENT DISCRIMINATION

DAMAGES

If you find in the Plaintiff's favor, you must then decide the issue of the Plaintiff's damages. You should consider the following elements of damage, to the extent you find them proved by the greater weight of the evidence:

(a) Net lost wages and benefits to the date of trial;

(b) Future lost wages and benefits reduced to present value;

(b) Mental anguish, loss of dignity, and any other intangible injuries;

(c) Punitive damages.

In considering the issue of Plaintiff's damages, you should assess the amount you find to be justified by the greater weight of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages.

In considering lost wages and benefits, you may value any earnings lost in the past or any loss of ability to earn money sustained in the past. Additionally, you may award damages for the value of any earnings or ability to earn expected to continue in the future.

In considering compensatory damages, you should be mindful that compensatory damages need not be proved with a high degree of specificity. They may be inferred from the circumstances. You may compensate the Plaintiff for intangible psychological injuries such as mental anguish, humiliation, and loss of dignity, as well as for financial, property, or physical harms and any other tangible injury. There is no exact standard for measuring such damages. Thus, no evidence of the value of such intangibles as mental anguish, loss of dignity, or damage to the Plaintiff's professional reputation or damage to [his/her] chosen career has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate Plaintiff for those claims of damage. The amount should be fair and just in light of the evidence.

In considering punitive damages, you are instructed that you may award punitive damages to punish the Defendant and/or to deter other employers from discriminating or retaliating against their employees. In order to award punitive damages, you must find that the Defendant acted with "malice or reckless indifference" to the Plaintiff's statutorily protected rights. Such malice or reckless indifference is demonstrated by simply showing that an individual involved in the decision or action at issue was one of the company's owners, officers and/or higher management officials and knew those actions might be in violation of the law. No

particularly egregious action or subjective ill will is required.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages.

Florida Civil Rights Act of 1992
EMPLOYMENT DISCRIMINATION
Disparate Treatment

In this case the Plaintiff makes a claim under the Florida Civil Rights Act of 1992, which prohibits employers from *discriminating against an individual with respect to the compensation, terms, conditions or privileges of employment*[1] because of the individual's [*insert protected category, e.g.,* race, color, religion, sex, national origin, age, handicap, or marital status].

More specifically, Plaintiff, [*insert name*], claims that Defendant, [*insert name*], [*insert adverse action at issue, e.g., failed to hire, demoted, failed to promote, terminated*] Plaintiff because of Plaintiff's [*insert protected category].*

Defendant denies Plaintiff's claim and asserts that it [*insert adverse action*] Plaintiff because [*insert legitimate, non-discriminatory reason alleged*].

In order to prevail on this claim, Plaintiff must prove by the greater weight of the evidence that:

First: The Defendant [*adverse action*] Plaintiff; and

Second: That Defendant [*adverse action*], at least in part, because of Plaintiff's [*protected category*].

[In the verdict form that I will explain in a moment, you will be asked whether questions concerning these factual issues.]

The law applicable to this case does not require the Plaintiff to prove that [*protected category*] was the sole or exclusive reason for the Defendant's action. Nor does the law require Plaintiff to prove that Defendant harbored some special "animus" or "malice" towards people of Plaintiff's [*protected category*]. It is sufficient if the Plaintiff proves that [*protected category*] was a motivating factor that prompted the Defendant to [*adverse action*] Plaintiff.

On the other hand, the law applicable to this case requires only that an employer not discriminate against the Plaintiff because of the Plaintiff's [*protected category].* An employer may [*adverse action*] an employee for any other reason, good or bad, fair or unfair. As long as the

[1] The Florida Civil Rights Act of 1992, like Title VII, also makes it unlawful "to limit, segregate, or classify an employee in any way which would deprive or tend to deprive an individual of employment opportunities" or to "adversely affect any individual's status as an employee" because of the individual's race, color, religion, sex, national origin, age, handicap, or marital status. Thus, if the facts of the case warrant, this language may be substituted for the italicized language above.

employer does not subject an employee to less favorable treatment because of the employee's [*protected category*], you may not second guess that decision even though you personally may not favor the action taken and would have acted differently under the circumstances.

[*If the same decision defense is not included, instruct as follows*]

If you find for the Plaintiff, you must then decide the issue of Plaintiff's damages.

[*Include the following if the same decision affirmative defense is asserted and applicable to the claim at issue*]

If you find in Plaintiff's favor with respect to each of the facts that the Plaintiff must prove, you must then decide whether the Defendant has shown by a preponderance of the evidence that Defendant would have [*adverse action*] the Plaintiff for legitimate, non-discriminatory reasons, even in the absence of consideration of Plaintiff's [*protected characteristic*].

The Defendant cannot meet its burden by showing it was motivated only in part by a legitimate reason. Nor can Defendant meet its burden by showing that the same decision would have been justified. The Defendant must show that it would have made the same decision based upon a legitimate, non-discriminatory reason, standing alone.

If you find that Defendant would have [*adverse action*] the Plaintiff for legitimate, non-discriminatory reasons, even in the absence of consideration of the Plaintiff's [*protected characteristic*], then you will make that finding in your verdict and not award Plaintiff damages.

If you find that the Defendant did not prove this defense by a preponderance of the evidence, you must then decide the issue of Plaintiff's damages

Florida Civil Rights Act of 1992
EMPLOYMENT DISCRIMINATION
Hostile Environment

HARASSMENT BY CO-WORKER(S)

In this case, the Plaintiff makes a claim under the Florida Civil Rights Act of 1992, which prohibits employers from discriminating against an individual with respect to the compensation, terms, conditions or privileges of employment because of the individual's [*insert protected category, e.g.,* race, color, religion, sex, national origin, age, handicap, or marital status].

More specifically, Plaintiff claims [he/she] was subjected to harassment that resulted in a hostile or abusive work environment because of [*insert protected category, e.g.,* race, color, religion, sex, national origin, age, handicap, or marital status], which is a form of prohibited discrimination.

In order to prevail on this claim, Plaintiff must prove the following facts by the greater weight of the evidence:

First: That the Plaintiff was subjected to a hostile or abusive working environment because of [*insert protected category, e.g.,* race, color, religion, sex, national origin, age, handicap, or marital status];

Second: That the Plaintiff's supervisor or someone with higher authority knew or should have known about the hostile or abusive work environment and failed to take effective remedial action.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

A work environment is considered hostile or abusive because of [*insert protected category*] if: (1) Plaintiff was subjected to unwelcome or offensive acts or statements based upon the Plaintiff's [*insert protected category*]; (2) such acts or statements were severe or pervasive to the extent that it materially changed the conditions of Plaintiff's employment; (3) a reasonable person, as distinguished from someone who is unduly sensitive, would have found the workplace to be hostile or abusive, and (4) the Plaintiff personally believed the work environment was hostile or abusive.

Whether a workplace environment is hostile or abusive can be determined only by considering all the circumstances. For example, things that may be considered include, but are not limited to: the frequency of the harassment, its severity, whether it was physically threatening or humiliating, whether it interfered with the Plaintiff's work, whether it affected the Plaintiff's emotional well being. No single factor is required, rather, the totality of the circumstances must be considered.

The Defendant, as the Plaintiff's employer, is legally responsible for a hostile or abusive work environment created by an employee or employees if Plaintiff's supervisor or someone higher in the chain of authority either knew ("actual knowledge") or should have known ("constructive knowledge") of the hostile or abusive work environment and permitted it to continue by failing to take prompt and effective remedial action.

To find that a supervisor or someone higher knew of the hostile or abusive working environment ("actual knowledge"), the Plaintiff must show that someone informed the supervisor of the harassment, or that the supervisor actually observed or heard the harassment.

To find that a supervisor or someone higher should have known of the hostile or abusive working environment ("constructive knowledge"), the Plaintiff must show that the harassment was so pervasive or so open and obvious that a reasonable person in the supervisor's position should have known the harassment was occurring.

[*If the Defendant raises an affirmative defense of lack of knowledge and prompt and effective remedial action, include the following*]

If you find that Plaintiff has proved the factual issues required, then you must consider the Defendant's affirmative defense.

In order to prevail on its defense, the Defendant must prove each of the following facts by a preponderance of the evidence:

1. That Defendant exercised reasonable care to prevent any harassing behavior in the workplace by implementing and communicating to employees anti-harassment policies and procedures with effective complaint procedures; and
2. That Plaintiff unreasonably failed to report the harassment by utilizing the Defendant's policies and procedures to correct the harassment [**or** *That, when Defendant learned of the harassment, Defendant responded by taking prompt and effective remedial action to stop the harassment.*]

[In the verdict form that I will explain in a moment, you will be asked questions concerning these factual issues.]

If you find in the Defendant's favor with respect to each of the facts that the Defendant must prove, then you must return a verdict for the Defendant. However, if you do not find that the Defendant has proven each of the facts required to establish its affirmative defense, you must return a verdict for the Plaintiff and determine the issue of damages.

Florida Civil Rights Act of 1992
EMPLOYMENT DISCRIMINATION

RETALIATION BECAUSE OF PROTECTED ACTIVITY

In this case, the Plaintiff makes a claim under the Florida Civil Rights Act of 1992, which prohibits employers from retaliating against a person because that person has opposed or complained of discrimination prohibited by the Act. The Act prohibits employers from discriminating against an employee because of race, color, religion, sex, national origin, age, handicap, or marital status. In addition, the Act prohibits employers from retaliating against an employee who opposes or complains about what he/she believes to be unlawful discrimination.

More specifically, Plaintiff claims Defendant [*insert retaliatory action(s) alleged*] because she opposed or complained of unlawful discrimination when [*insert description of protected activity alleged*].

In order to establish the claim of unlawful retaliation, the Plaintiff must prove by a preponderance of the evidence:

First: That [he/she] engaged in "statutorily protected activity";

Second: That an "adverse employment action" then occurred;

Third: That the adverse employment action was "causally related" to the Plaintiff's statutorily protected activities.

"Statutorily protected activity" includes asserting an internal complaint about discrimination [or retaliation] or otherwise opposing a violation of one's rights under the Florida Civil Rights Act of 1992. It also includes filing a charge of discrimination under the Act with the Florida Commission on Human Relations [*or the U.S. Equal Employment Opportunity Commission or similar local agency*] or participating in any investigation by the Commission.

When the statutorily protected activity is complaining or opposing discrimination or retaliation, the complaint or opposition must be based upon a "good faith" belief that something was a violation of the Act. In order to show good faith, Plaintiff need only show that [his/her] belief in this regard was sincere and that [his/her] belief, even if ultimately mistaken, was reasonable under the circumstances. In other words, even if [his/her] complaint concerning discrimination and/or retaliation were later found to be invalid or without merit, it is unlawful for

his/her employer to penalize [him/her] in retaliation for having made such complaints.

When the statutorily protected activity is filing a charge of discrimination under the Act, there is no "good faith" belief requirement. Filing a charge of discrimination with the Commission is absolutely protected activity even if the charge had no merit.

For purposes of unlawful retaliation, an "adverse action" is any type of threat, harassment, or other adverse treatment or action if it is reasonably likely to deter protected activity by either the Plaintiff or other employees. For example, adverse actions may include, but are not limited to: retaliatory harassment; continuing the discrimination or harassment complained of; undesirable work assignments; being subjected to closer scrutiny; being subjected to disciplinary actions; and of course, demotion or termination. Moreover, even if you find that certain actions alone would not be sufficient to constitute an "adverse action," you may determine that, when considered collectively, they are sufficient to constitute an adverse action.

For an adverse employment action to be "causally related" to statutorily protected activities it must be shown that the protected activity and the adverse action were not completely unrelated. It is not necessary for Plaintiff to prove that [his/her] protected activity was the sole or exclusive reason for the Defendant's action or decision. It is sufficient if the Plaintiff proves that [his/her] protected activity was related, at least in part, to the Defendant's decision or action.

Finally, it is not necessary for Plaintiff to show that the employer, as an entity, had any retaliatory intent. The employer is liable for the actions of its supervisory employees.

Florida Civil Rights Act of 1992
EMPLOYMENT DISCRIMINATION
Hostile Environment

HARASSMENT BY SUPERVISOR WITH TANGIBLE EMPLOYMENT ACTION

In this case, the Plaintiff makes a claim under the Florida Civil Rights Act of 1992, which prohibits employers from discriminating against an individual with respect to the compensation, terms, conditions or privileges of employment because of the individual's sex.

More specifically, Plaintiff claims [he/she] was subjected to sexual advances or harassment that culminated in a tangible employment action being taken against [him/her].

In order to prevail on this claim, Plaintiff must prove the following facts by the greater weight of the evidence:

First: That a supervisor of Plaintiff subjected [him/her] to unwelcome sexual advances or harassment; and

Second: That a "tangible employment action" was taken against Plaintiff because the Plaintiff rejected such unwelcome sexual advances or harassment.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

Unlawful sexual harassment may take the form of unwelcome sexual advances or other harassment based upon sex, even if it is not sexual in nature. It is unlawful for a supervisor to subject an employee to less favorable treatment or harassment in the workplace because of the employee's sex. It is likewise unlawful for a supervisor to change the compensation, terms, conditions or privileges of an individual's employment because the employee rejects the supervisor's sexual advances. Similarly, it is unlawful for a supervisor to threaten to change the compensation, terms, conditions or privileges of a person's employment as a means of coercing, or attempting to coerce, a sexual relationship with the employee.

When sexual harassment is carried out by a supervisor with immediate or successively higher authority over the Plaintiff culminating in a tangible employment action against the employee, the Defendant-employer is responsible under the law for such behavior. A "tangible

employment action" includes any action which adversely affects the compensation, terms, conditions or privileges of Plaintiff's employment.